

ST 01-25

Tax Type: Sales Tax

Issue: Responsible Corporate Officer – Failure to File or Pay Tax

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

THE DEPARTMENT OF REVENUE)	Docket No.	01-ST-0000
OF THE STATE OF ILLINOIS)	NPL No.	0000
v.)	IBT No.	0000-0000
JANE DOE , as responsible)		
officer of ABC Resale Shop,)	John E. White,	
Taxpayer.)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: JANE DOE appeared on her own behalf;
Mark Dyckman appeared for the Illinois
Department of Revenue.

Synopsis:

This matter arose after JANE DOE (“Doe” or “taxpayer”) protested a Notice of Penalty Liability the Illinois Department of Revenue (“Department”) issued to her. Notice of Penalty Liability (“NPL”) no. 0000 assessed a penalty equal to the unpaid retailers’ occupation tax (“ROT”) liability of the ABC Resale Shop regarding gross receipts from that business’ transactions during the quarter year periods ending in December 1997 through September 1999, though not inclusive.

At hearing, taxpayer offered into evidence certain books and records prepared or kept by the Department regarding the business. Taxpayer also offered her own testimony. I am including in this recommendation findings of fact and conclusions of law. I recommend that the NPL be revised to eliminate the amounts assessed regarding the first through third quarters of 1999.

Findings of Fact:

1. Taxpayer was one of two general partners who conducted business as the ABC Resale Shop (“the Shop”). Taxpayer Ex. 4 (Department form NUC-1, Illinois Business Registration application), § 1, line 9.
2. The Shop sold second hand and new merchandise at retail. Taxpayer Ex. 4, § 1, line 4.
3. Doe and her partner, Joe Blow (“Blow”), both shared responsibility for preparing and filing the Shop’s ROT returns, and for paying the taxes required to be shown due on those returns. Taxpayer Ex. 3 (taxpayer’s responses to the Department’s Interrogatories, response no. 10).
4. The Shop filed ROT returns on a quarterly basis. *See* 35 **ILCS** 120/3.
5. The NPL assessed the following amounts of tax, penalties and interest for the following periods:

Quarter	Tax	Penalty	Interest*	Totals
4 th Q 1997	251	50	73.23	374.23
2 nd Q 1998	230	51	55.83	336.83
3 rd Q 1998	346	76	74.90	496.90
4 th Q 1998	249	55	47.86	351.86
1 st Q 1999	213	47	37.12	297.12
2 nd Q 1999	244	54	36.35	334.35
3 rd Q 1999	346	76	43.90	465.90
Totals	1,879	409	369.19	\$ 2,657.19

Department Ex. 1 (* as stated on the face of the NPL, the interest stated reflects only the interest accrued as of 1/09/2001. If the penalty is determined to be due, interest will continue to accrue pursuant to 35 **ILCS** 735/3-2).

6. Doe left the partnership on or about February 7, 1999. Taxpayer Exs. 1 (copy of signed agreement between Doe and Blow), 3 (response nos. 3, 10); Tr. p. 13 (Department's closing argument).
7. Until shortly before the date she left the partnership, Doe prepared and signed the Shop's ROT returns. Taxpayer Ex. 3 (response no. 10).
8. Doe signed the Shop's return for the 4th quarter of 1997, and she filed it without any payment. Taxpayer Ex. 2; Department Ex. 1.¹
9. Doe prepared and signed the Shop's return for the 1st quarter of 1998, and she filed it with payment. *See* Taxpayer Ex. 3 (response no. 10); Department Ex. 1 (no unpaid tax liability for the 1st quarter of 1998).
10. Blow signed and filed the Shop's returns for the 3rd and 4th quarters of 1998, and its returns for the 1st through 3rd quarters of 1999, on 11/16/99. Taxpayer Group Ex. 6. *Id.* Those returns were also filed without payment. *See* Department Ex. 1.
11. Doe and Blow both decided the order of the Shop's debt payments. Taxpayer Ex. 3 (response nos. 11(a)-(d)).
12. Before she left the partnership, Doe, together with Blow, decided to pay the Shop's rent, utilities and other debts, when she knew that the Shop's retailers' occupation taxes were not being paid. Taxpayer Ex. 3 (response nos. 11(a)-(d)).

Conclusions of Law:

Section 3-7 of the Uniform Penalty and Interest Act ("UPIA"), authorizes the imposition of a personal responsible penalty to persons charged with filing a corporation's, partnership's or limited liability company's tax returns, and who willfully:

¹ Each of the assessments listed on the NPL is a "B" assessment. I take official notice that a "B" assessment is one that is based on a signed return that was filed without payment.

- (2) fails to file such returns **or**
- (3) fails to pay the tax(es) shown due on such returns to the Department **or**
- (4) attempts, in any other manner, to evade or defeat the tax.

35 ILCS 735/3-7(a), (e).

When the Department introduced the NPL into evidence under the certificate of the Director, it presented prima facie proof that Doe was personally responsible for the Shop's unpaid tax liabilities. 35 ILCS 735/3-7(a)-(b); Branson v. Department of Revenue, 68 Ill. 2d 247, 261, 659 N.E.2d 961, 968 (1995). The Department's prima facie case is a rebuttable presumption. Branson, 68 Ill. 2d at 261, 659 N.E.2d at 968 ("After the Department presents a prima facie claim for tax penalty liability, our construction of section 13½ places the burden on the taxpayer to establish that one or more of the elements of the penalty are lacking."). A taxpayer cannot overcome the presumption merely by denying the accuracy of the Department's assessment, or merely by denying knowledge of a tax deficiency. Branson, 68 Ill. 2d at 267, 659 N.E.2d at 971 ("... lack of willfulness is not proved simply by denying conscious awareness of a tax deficiency that could have been easily investigated by an inspection of corporate records."); A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833, 527 N.E.2d 1048, 1053 (1st Dist. 1988). Instead, a taxpayer has the burden to present evidence that is consistent, probable and closely identified with its books and records, to show that the assessment is not correct. Fillichio v. Department of Revenue, 15 Ill. 2d 327, 333, 155 N.E.2d 3, 7 (1958); A.R. Barnes & Co., 173 Ill. App. 3d at 833-34, 527 N.E.2d at 1053.

Doe introduced copies of the Shop's returns for the 3rd and 4th quarters of 1998, and for the 1st through 3rd quarters of 1999. Taxpayer Group Ex. 6. Blow signed each of

those returns. *Id.* She also introduced a copy of the Shop's application for a business registration number from the Department, which Blow signed as the person who "... accept[ed] personal responsibility for the paying of the filing of returns and the payment of taxes due." Taxpayer Ex. 4, p. 2 (§ 2, question 12). Those documents, however, do not absolve Doe of responsibility for the Shop's unpaid taxes. That is because it is clear, under the plain text of § 3-7 of the UPIA, that more than one person may be a responsible officer or employee. 35 ILCS 735/3-7(a) (penalty to be assessed against "[a]ny officer or employee ..." with the requisite status and authority, and who acts willfully); *see also*, *e.g.*, Estate of Young v. Department of Revenue, 316 Ill. App. 3d 366, 734 N.E.2d 945 (1st Dist. 2000) (affirming the assessment of penalty against one brother and the estate of another who were, respectively, vice-president and president of a corporate taxpayer).

Here, Doe and Blow were general partners in the business. Taxpayer Ex. 1, 3. As described in Doe's responses to the Department's written interrogatories, she and Blow were both responsible for preparing and filing the Shop's ROT returns, and for paying the taxes shown due on those returns. Taxpayer Ex. 3 (response no. 10). Until she left in February 1999, Doe prepared and signed the Shop's returns. Taxpayer Ex. 3 (response no. 10); Department Ex. 2. Doe signed and filed the Shop's ROT return for the 4th quarter of 1997, without payment. Taxpayer Ex. 2; Department Exs. 1, 2. She thereafter prepared and filed the Shop's next return with payment. *See* Taxpayer Ex. 3 (response no. 10); Department Ex. 1. Doe, therefore, was one of the two persons whose actions determined whether or not the Shop's taxes would be paid.

Doe and Blow also decided the Shop's order of debt payment by mutual agreement. Taxpayer Ex. 3 (response no. 11(d)). In Doe's own words, "[w]e paid the

necessary bills to survive. Rent utilities, food, we were struggling, so we never had enough to go around.” *Id.* (response no. 11(b)). Thus, Doe concedes that she was paying the Shop’s other creditors when its retailers’ occupation taxes were not being paid. *Id.* (response no. 11(d)). Those facts are sufficient to conclude that Doe has not rebutted the Department’s prima facie showing that she is subject to the personal liability penalty for the time when she was a general partner in the partnership. 35 **ILCS** 735/3-7; Branson, 68 Ill. 2d at 261, 659 N.E.2d at 968; Estate of Young, 316 Ill. App. 3d at 378-79, 734 N.E.2d at 954.

Doe, however, also introduced documentary evidence to show that she left the partnership, and the business, in February 1999. Taxpayer Exs. 1 (taxpayer’s protest, and a signed agreement between Doe and Blow disclosing that Doe left the partnership in February 1999), 3 (response nos. 3, 10-11)). The Department does not dispute this critical fact. *See* Tr. p. 13 (closing argument). So, while the evidence is clear that Doe was a responsible officer or employee of the Shop during the time she was a general partner, the record is equally clear that she stopped having any responsibility over the partnership’s business affairs in February 1999, before the Shop’s first return for 1999 was due to be filed. Department Ex. 1; Taxpayer Exs. 1, 3, 6. Thus, I conclude that Doe has rebutted the Department’s prima facie determination that she is subject to a personal liability penalty regarding the Shop’s unpaid taxes for the 1st through the 3rd quarters of 1999.

Conclusion:

I conclude that JANE DOE is liable for a personal liability penalty for the time when she was a general partner of the ABC Resale Shop. 35 **ILCS** 735/3-7. Since she

terminated her status as a partner in the business in February 1999, I recommend that the Director revise the NPL so as to eliminate that part of the penalty that is attributable to the Shop's unpaid retailers' occupation tax liabilities for the 1st through the 3rd quarters of 1999. The NPL should be finalized as so revised, with interest to accrue pursuant to statute.

10/9/01
Date

Administrative Law Judge